Obtain a printout of all digested articles in your area of interest

If you would like a printout of all articles which have been digested on your area of interest since the *Digest* was first published in July 1992, just write, fax or E-mail to the Centre. We can only provide printouts under the Subject Area headings listed in bold on the last page of this issue. The cost is $Aus5 per A4 page, which includes postage.

CONTEXT, CRITICISM & THEORY

Beyond MacCrate: the role of context, experience, theory and reflection in ecological learning
B K Baker
36 *Arizona Law Review*, 1994, pp 287-356

The recent ABA Report of the Task Force on Law Schools and the Profession - Narrowing the Gap (the MacCrate Report) mainly tips its hat to the traditional 'core curriculum' for doing its job well in teaching substantive law and developing analytical skills, while valorising the skills pedagogy in simulation courses and live-client clinics. Rather than narrowing the gap, the Task Force has perpetuated, even reified, the chasm between the academy and practice, at least during law school.

The author considers that there is an emerging theory of ecological learning which draws on cognitive research and theory. This new contextualism draws attention to the embodiment, enculturation, and sociability of cognition and to the 'enactive' construction of perception, memory and categories. The focus on contextualism gives rise to questions about specialised contexts, historically-based practice domains such as lawyering and to related questions concerning the degree of understanding from one specialised domain or sub-domain to another.

There is some support within the legal academy for a theory of ecological learning from three diverse law school groups; neo-pragmatists, feminists and clinicians. Each has championed the call to context and the experiential lessons it imparts providing additional support for a theory that law students might learn through immersion in the performance dilemmas of practice settings. Legal neo-pragmatism suggests that we abandon abstract categories and deductive reasoning for more contextual and concrete reasoning of situated practitioners. Pragmatism draws on a multi-faceted web of contextual meaning and a historically-based consensual way of life. It is a reflective process which resonates between the abstract and the specific case so that the particular reconstructs and animates the abstract at the same time that the abstract formulates and transforms the concrete.

Emphasising context and validating everyday experience is a central component of feminist theory as well. Like pragmatism, feminism emphasises the value of direct and personal experience as the place where theory should begin. The shared experience focus of feminism emphasises the centrality of dialogue and connection. Both neo-pragmatism and feminism support an educational theory that urges immersion in a contextual ecology. The learner cannot feel the pushes and pulls of context unless she is in context. She cannot do practical reasoning unless she is situated in and attending to the details of the concrete. She cannot observe, appreciate and emulate the practices and procedures of an expert community unless she is exposed to that community.

Clinicians, of course, have structured most of their pedagogy around contextual experience. Proponents of externship assert that legal externships and other practice-based legal work are superior in contextual realism to any other form of legal education. This is because they expose students to a wide spectrum of legal practice settings, including highly specialised areas of practice, a wide variety of legal tasks and the myriad of economic, interpersonal, intrapsychic and ethical constraints that impact upon a legal practitioner.

There are three steps in constructing a theory of ecological learning, the goal of which in the context of legal education is to explode the school-and educator-centred container and conduit metaphors which have led legal educators and regulators to devalue the contextualised learning experiences of our students. First, cognition is enactive and contextual. Therefore, context makes all the difference, especially when one is trying to join an expert domain such as lawyering. Secondly, we learn from experience. Thirdly, theory and reflection need to be repositioned at the heart of experience. The proper role of theory and reflection is realised primarily in the moment of contextualised real experiences in a social practice domain.

Law students must then be exposed to the real world context of practising lawyers to learn about the pragmatic interpretation, uncertain predictions, strategic planning and actual performances of lawyers. Practice-based settings can be seen as the laboratories for practical reasoning and experience. Drawing on his/her growing

accumulation of experiences, the fledgling lawyer diagnoses the concrete problem, seeking a flexible, contextual and pragmatic solution. The bulk of cognitive research supports the view that the vibrant theory of practitioners is largely encapsulated within the memorable metaphors of past practice and that analogy and metaphor predominate over rule-driven rationalism. The net effect of these insights is that the most effective location of cognition and reflection is in-action rather than segregated to distant, less relevant locations before-or-after-the-fact. Cognition/reflection-in-action is the process by which theory becomes encapsulated within experience as practice metaphors. It emphasises cognitive engagement and dialogue with the situational dilemma, as a mechanism of cognitive pluralism and as thematic scaffolding for further cognitive development. It reminds us that the spotlight of concurrent reflection can countermand subconscious cultural commands and illuminate new worlds of resistance and transformation. It is important to remember that the ultimate goal of cognitive transformation and acculturation within a new social practice domain is an internal one of confronting and revising immature understandings and ineffectual conventional understandings as well.

EVALUATION

The how and why of law school accreditation
R A. Cass
45 *J Legal Ed* 3, September, 1995, pp 418-425

When insiders are asked why we have law school accreditations, they will advance seven distinct reasons:

1 Accreditation could be a form of certification intended to convey information about quality, signalling the best quality legal education.

2 It could be a consumer-protection measure, intended to prevent fraud on consumers of legal education. Here, the concern is that law schools may be not really conferring value for the money received from their students.

3 Accreditation could be a consumer protection measure, focused not on consumers of legal education but on consumers of legal services.

4 It might be designed to protect the legal profession. The problem seen by proponents of this version is not simply the effects that bad lawyers have on third parties but the more diffuse effects that entrants into the legal profession can have on other lawyers.

5 Accreditation might be designed to protect law schools either by limiting competition or by helping law schools to do battle with university administrations that find other uses for university resources attractive.

6 It could be aimed at protecting selected law school constituencies, such as increasing the salaries of law professors or law librarians.

7 It could serve the interests of the accreditation bureaucracy, such as increased compensation, control over increased resources and greater power.

It is reasonable to ask how the present system coincides with these rationales. The ones that are the best fit with the current accreditation system are the rationales that come at the end of the list. The hallmarks of the present system are as follows:

1 Law school accreditation does not provide information that distinguishes one law school from another. It is essentially exclusionary, not informational.

2 There is little supervision of the actual content of instruction. Rules directed at what is being taught, such as the requirement for instruction in legal ethics, are extremely rare.

3 The system constitutes a one-way ratchet for more expensive legal education. In order to become an ABA-accredited law school, an institution must pay a fee to the inspectors and must conform to a long list of standards that focus largely on the inputs to legal education which, in general, require expenditures.

4 The system requires rearrangement of resources within schools, largely promoting increased faculty control and increased faculty compensation.

5 The system retards change and reduces competition between schools as well as between new law school graduates and lawyers. The accreditation process reduces competition by raising the cost of legal education and by putting downward pressure on the number of positions available in approved schools. It slows change and competition among school by making new programs, new degree offerings, and other major changes in law school operation subject to approval from the accrediting body.

6 Finally, for schools that have passed the accreditation hurdle, the present system operates as a form of extortion preying on the uninitiated. It appears that schools almost never lose their accreditation, but are routinely told that there are concerns that put accreditation in jeopardy. The way to avoid the threat of revocation is to hire more faculty, increase faculty salaries, spend more on the library, invest in a new building and so on. The game works the same way for allocation of resources within a law school as it does with respect to allocation of funds to its law school.

Taken together, these observations portray an accreditation system that is more consistent with the goals of accreditor protection, constituent